EMPLOYMENT TRIBUNALS

Claimant: **Bradley Jones**

Respondent: **J P Morgan Securities plc**

Heard at: **London East Hearing Centre**

On: **25-26 November 2021 & 9 December 2021**

Before: **Employment Judge S Knight**

Representation

Claimant: Thomas Ogg (11KBW)

Respondent: Paul Goulding QC (Blackstone Chambers)

JUDGMENT having been sent to the parties on 15 December 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

The parties

1. The Claimant was employed by the Respondent as a Financial Analyst and Cash Equities Trader. He was deemed to be employed by the Respondent between 19 August 2011 and 31 January 2020. The Respondent is part of JP Morgan Chase & Co, a global financial services firm.

The Liability Judgment and the remedy sought

2. In a Liability Judgment of 29 June 2021 the Tribunal concluded that the Claimant had been unfairly dismissed. The Claimant sought reinstatement, or reengagement, or compensation.

Procedure, documents, and evidence heard

Procedure

3. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was "***V****: video whether partly (someone physically in a hearing centre) or fully (all remote)*". A face-to-face hearing was not held because it was not practicable due to the COVID-19 pandemic and no-one requested the same.

4. All participants attended the hearing through Cloud Video Platform.

5. At the start of the hearing I checked whether any reasonable adjustments were required. Those in attendance confirmed that none were required.

Documents

6. I retained the agreed Hearing Bundle and witness statements from the liability hearing. I was also provided with a Remedy Bundle. Witness statements were provided from the following:

   (1) The Claimant (his third and fourth witness statements);

   (2) Christopher Berthe (the Respondent's Global Co-Head of Cash Equities Trading);

   (3) Luiz De Salvo (the Respondent's Head of Global Equities Syndicate for the Corporate and Investment Bank ("**CIB**"));

   (4) Elizabeth Pape (the Respondent's Senior Compensation Manager);

   (5) Tom Quirke (a Recruitment Manager in the Respondent's Europe, Middle East and Africa ("**EMEA**") Wholesale Front Office Recruitment team);

   (6) John Rivett (the Respondent's Head of Employee Compliance and Conduct for EMEA); and

   (7) Jason Sippel (the J P Morgan group of companies' Global Head of Equities for the CIB).

7. In addition, the parties both provided helpful written skeleton arguments in advance of the hearing.

Application to exclude evidence

8. The Claimant applied to be allowed to rely upon a witness statement served the

day before the hearing. That was after the agreed date for exchange of witness statements. The Claimant's first two witness statements related to the liability hearing. His third witness statement was served on time for the remedy hearing. It was his fourth witness statement which was served late.

9. In summary, Mr Ogg submitted that the Claimant's fourth witness statement dealt with matters that had arisen since the date for service of witness statements. Mr Ogg noted that the assessment of practicability of re-employment had to be decided at the date of the hearing.

10. Mr Goulding on behalf of the Respondent resisted the application on 3 grounds. Firstly, he said that there was no good reason shown why the majority of the evidence contained in the fourth statement, could not have been served on the date for exchange of witness statements. In particular, the job roles to which the Claimant sought re-engagement that were dealt with in the witness statement have been around for a considerable period, and the witness statement also contains general commentary on suitability for re-employment that has been known about for a considerable period of time. Secondly, late service causes prejudice to the Respondent, because the Respondent's witnesses have not been able to provide detailed instructions on the contents of the witness statement. However, they would provide a witness statement in response the same day. Thirdly, the Claimant would gain an unfair advantage from serving a witness statement after the Respondent served its witness statements, because the Claimant knows what the Respondent's evidence is so could respond to it.

11. In considering whether to grant the Claimant permission to rely on his fourth witness statement I considered the overriding objective of dealing with cases fairly and justly. That includes amongst other matters considering proportionality to the complexity of the issues, avoiding delay, and saving expense.

12. I concluded that Mr Goulding's criticisms of the Claimant's fourth witness statement in respect of paragraph 39 onwards were good criticisms: this material could have been provided earlier. However, in respect of the other material, it either could not have been provided earlier, or if it could, then the Tribunal and indeed the Respondent would benefit from having it in writing so that the Claimant could be cross-examined on it. Further, the Respondent would have the opportunity to submit a further witness statement in response. As such, there would be no material prejudice to the Respondent in allowing the Claimant to rely on paragraphs 1 to 38 of his fourth witness statement.

13. I therefore allowed the Claimant to rely on paragraphs 1 to 38 of his fourth witness statement, and allowed the Respondent to rely on a further witness statement from Tom Quirke, which was submitted during the hearing.

Evidence

14. At the hearing I heard evidence under affirmation from all of the witnesses except for Ms Pape, whose evidence was agreed. Each of the witnesses who gave oral evidence adopted their witness statements and added to them.

Closing submissions

15. Both parties made helpful oral closing submissions. Both parties also provided detailed written closing submissions which I considered between the second and third days of the hearing.

Findings of fact

The Claimant's remuneration referable to the period before his dismissal

16. The Claimant's Total Compensation ("**TC**") was composed of 3 parts: (1) a base salary; (2) Incentive Compensation ("**IC**") which was a bonus broadly referable to performance; and (3) a fixed award, not directly referable to performance.

17. IC is structured in a way which leads to part of it not being paid immediately. It vests at a later date if an employee remains in the Respondent's employment.

18. The Claimant's base salary was agreed in 2018 after he rejected an offer to join another firm. It was agreed as £190,000.

19. Prior to the Claimant's dismissal on 31 January 2020 the Respondent decided not to promote the Claimant in 2020. Despite the Claimant's accepted skill, it would have been unusual for the Claimant to have been promoted in 2020. It would simply have been unfeasibly quick. This was particularly the case given that the Claimant's 2019 performance year was less good than his previous performance years. He received an OSO rating, which was 2 ranks below perfect.

20. However, in line with his undoubted skill and experience, the Claimant would have been promoted to Executive Director in 2021.

21. If the Claimant had not been dismissed then he would have received IC for the 2019 performance year. The value of the IC for the 2019 performance year would have been determined in January 2020. The IC for the 2019 performance year would have been paid on 31 January 2020.

22. The Claimant would have received IC for the 2020 performance year on 31 January 2021. The Claimant would have received IC for the 2021 performance year on 31 January 2022.

23. The Respondent says that the Claimant's IC for the 2019 performance year would have been $251,811, payable on 31 January 2020 (resulting in TC for 2019 of $548,500). The Respondent says that this figure was already settled prior to the Claimant's dismissal, although no award was made because of his dismissal. In contrast, the Claimant says that he would have received a higher level of TC, which would have been brought about either by giving him a higher IC or a higher fixed allowance. He says that this is evidenced by a conversation with Mr Nicholas and Mr De Silva which took place in 2018. The purpose of that conversation was to set expected rates of remuneration for the Claimant so that he would be incentivised not to leave the Respondent's employment and work for a competitor.

24. The Claimant's performance in the 2019 performance year was below what he

would have wanted to achieve. His net and gross commission were down 24% year-on-year. His performance rating (two grades away from a perfect score) was the lowest he had ever received. This was in the context of a less good performance than expected across the entirety of the team in which the Claimant worked.

25. At the time of his conversation with Mr Nicholas and Mr De Silva in 2018 the Claimant accepted that his future remuneration would continue to be linked to his performance.

26. A drop in total compensation to $548,500 would amount to a reduction of over 18% year-on-year for the Claimant. The Claimant would find this demoralising. However, it would equally be an incentive for him to improve his performance in future years. That is, in terms, what the IC is intended to achieve.

27. I accept the Respondent's case that the Claimant's 2020 IC referable to the 2019 performance year had been set before the Claimant's dismissal and was unaffected by the disciplinary proceedings relating to the Claimant. Even if the Claimant had not been subject to disciplinary proceedings he would still not have been able to successfully argue for higher compensation. It was ultimately Mr De Silva's decision what IC to award, and Mr De Silva's mind was already made up.

28. As such, the Claimant's total IC paid on 31 January 2020 and referable to the 2019 performance year would have been $251,811, giving the total remuneration of $548,500 for the 2019 performance year referred to earlier.

The Claimant's hypothetical remuneration had he not been dismissed

29. In 2020 the Claimant's TC would have risen compared to 2019 by the same mean year-on-year percentage increase as the top third of performers at Vice President or Executive Director level on the trading desk that year. That 2019 to 2020 year-on-year increase was 33.2%.

30. As such, the Claimant's TC referable to the 2020 performance year would have been $548,500 x 1.332 = $730,602.

31. The parties have agreed that the Claimant's TC referable to the 2021 performance year would have been 20% higher than the 2020 performance year.

32. As such, the Claimant's TC referable to the 2021 performance year would have been $730,602 x 1.2 = $876,722.40.

Further non-remuneration employment payments

33. During his employment, in addition to his TC, the Claimant received non-remuneration employment payments. These are matters such as pension contributions and medical insurance, which are agreed between the parties.

The Claimant's wishes

34. The Claimant says that he wants to be reinstated or reengaged by the Respondent. The Respondent says that this is not true. I have rejected the

Respondent's case on this point for the following reasons in particular.

(1) Firstly, the Claimant's entire career, and much of his entire life, has been structured around working for the Respondent and its affiliated companies. It is work he wants to do and which provides him with a great deal of fulfilment.

(2) Secondly, the Claimant does not bear the Respondent or its associated companies as an entity ill-will.

(3) Thirdly, the Claimant will find it difficult to find work elsewhere, because of the incorrect belief by prospective alternative employers that there is "no smoke without fire" and because he was willing to take his former employer to an Employment Tribunal. Further, as set out below, the Respondent will provide a negative regulatory reference for the Claimant.

(4) Fourthly, the Claimant's oral evidence and way he put his case on the issue has been compelling: the Claimant in cross-examination was given by the Respondent the opportunity to say he would accept any, relatively low-paying work, which would allow him to be re-engaged, and therefore to circumvent the statutory cap on unfair dismissal compensatory awards. But the Claimant stuck to his guns, requiring work that was demanding for him, and which was appropriately remunerated. That could potentially reduce the number of suitable positions to which he could be re-engaged. This was either the action of someone who was cynically tailoring their evidence and playing the Tribunal so that they could circumvent the statutory cap on compensatory awards on unfair dismissal, or of someone who genuinely believed what he was saying. I have found that the Claimant's evidence was genuine. His evidence in this regard is reliable.

35. The Claimant is now in employment in a company he co-founded. He has carefully structured his new employment so that he can leave his employment on 3 months' notice in order to be reemployed by the Respondent. His employer, and in particular his co-directors and the shareholders and investors in his employer, with whom he is either close friends or is otherwise close, would permit him to leave his employment with 3 months' notice. In this regard, the Claimant's current contract of employment allows him to leave with 3 months' notice if he is reinstated by the Respondent as a result of his Tribunal claim. However, even if reengagement was ordered instead of reinstatement, he would be allowed to leave on 3 months' notice. Given that the Claimant has always (from the filing of the ET1 claim form onwards) claimed reinstatement *or* reengagement as a remedy, it is plain that this was what the Claimant intended his current contract of employment to mean, and it is also what his employer intended it to mean. The Claimant could leave his new employment with slightly less than 3 months' notice if required, but not considerably less. 3 months' notice is required to get a new director up-to-speed in the role. With that qualification in mind, the Claimant wants to be reemployed by the Respondent as soon as possible.

36. The Claimant now has a fiancée. His fiancée lives in Brazil. They would happily move together either to London, New York, or Hong Kong. They may also be willing to move other places together. The Claimant's fiancée has structured work

commitments to make this possible.

Reduction in work on the Claimant's former team

37. The Claimant says that there is enough work in his former team for him to fit back into it. In contrast, the Respondent says that there have been redundancies from the Claimant's former team. The Claimant says that the Respondent has overstated the effect of those redundancies.

38. When the Claimant was dismissed, he was not replaced and his work was absorbed by the wider team trading in the Consumer sector. The Respondent decided that it had capacity available on the team and did not need to retain the role that the Claimant had been performing prior to his dismissal.

39. Further, redundancy exercises have affected the Claimant's former team, resulting in the reduction of staffing. The Claimant's former team has been reduced from being staffed by 8 Executive Directors and 2 Vice Presidents, to 6 Executive Directors and 1 Vice President. It is now appropriately staffed for its level of activity and client needs that it is supporting.

40. If the Respondent was required to reinstate the Claimant, then there would be one employee too many in the team, and as a result there would be a further redundancy exercise.

Mr Sippel's view of the Claimant

41. Mr Sippel has responsibility for CIB's Cash Equities, Equity Derivatives, Prime Finance, and Clearing businesses. He is personally accountable to the regulators for fulfilling his responsibilities as a Senior Manager. This includes obligations under the Senior Manager Conduct Rules to take reasonable steps to ensure that the business of the Respondent for which he is responsible complies with regulatory requirements and is effectively controlled. His responsibilities include taking reasonable steps to ensure that the Respondent's framework for compliance with the Senior Managers & Certification Regime ("**SMCR**") is effectively implemented in relation to the Respondent's Global Equities business. Action could be taken against him by the regulators if he failed to comply with his obligations under the Senior Manager Conduct Rules or if he was knowingly concerned in a breach by the Respondent of its obligations.

42. Mr Sippel was consulted on the approach to take to the Claimant during the disciplinary process.

43. Mr Sippel believes the Claimant to be guilty of misconduct in relation to the 2016 Sell Orders.

44. If the Claimant was reinstated within an area of his responsibility then Mr Sippel would protest within the Respondent's structures. However, after his protest had been noted, he would not resign from his position, and would accept the Claimant's reinstatement.

45. During the course of his evidence it became clear that Mr Sippel's position was that the Claimant should have proved his innocence in the 2016 Investigation in

ways that the Claimant was not asked to do, and which were not feasibly possible. In the Liability Judgment I set out the circumstances surrounding the 2016 Investigation and the difficulty that the Claimant would have had proving his innocence when investigated. One element of the 2016 Investigation is that the Claimant was invited into an investigation meeting with no notice. In his evidence, Mr Sippel said that he expected the Claimant to have turned up to that meeting with evidence of his innocence and an opening statement prepared. It would not have been practicable to do this, given that the Claimant did not know what charge he would have to defend himself against or even that he was defending himself against a charge of market abuse. Further, Mr Sippel's view is that the Claimant should never have relied on having been exonerated in the 2016 Investigation, and, despite the exoneration, should have gathered evidence after the 2016 Investigation as "insurance".

46. Mr Sippel has also not intellectually engaged with part of the Liability Judgment, that although each of the explanations offered by the Claimant for the 2016 Sell Orders may individually be unlikely, they are individually *and in combination* more likely to be true than that the Claimant engaged in criminal conduct.

47. Mr Sippel has closed his mind to the possibility that the Claimant did not commit misconduct as originally alleged. Mr Sippel has as a result closed his mind against the possibility of reinstating the Claimant and of an employee of the Respondent certifying the Claimant as fit and proper to perform the Claimant's former role. In this regard, Mr Sippel has applied the New Spoofing Policy to the Claimant. He has concluded that because under the New Spoofing Policy the Claimant cannot prove himself innocent, he cannot be a fit and proper person.

48. It would be embarrassing to the Respondent, and to Mr Sippel in particular, to resile from the Respondent's application of the New Spoofing Policy to the Claimant at this point. However, that embarrassment would be a matter of damaged pride, rather than a matter of damaged interests.

49. If the Claimant was reinstated by the Respondent, it would be open to another member of staff, not just Mr Sippel, to certify the Claimant to the regulators as "fit and proper" to perform his role.

50. If the Claimant was reinstated by the Respondent, the regulators would be unlikely to take any action against the Respondent. Rather, they would accept the decision to reinstate the Claimant as flowing from the reasoned conclusions of the Tribunal.

Regulatory references

51. Some roles in financial services are heavily regulated. The effect of the heavy regulation is that employers have to obtain regulatory references for their new employees. Those references come from previous employers in the sector.

52. Despite the Liability Judgment of the Tribunal, if the Claimant sought employment at another employer in the financial services sector within the United Kingdom in a regulated role, the Respondent would provide a reference stating that they consider him not to be a fit and proper person to perform the role. The practical

effect of this is that the Claimant would not be able to obtain another similar role in financial services in the United Kingdom.

The Claimant's suitability for employment in Hong Kong

53. The Claimant has identified a vacancy ("**the Hong Kong Role**") in the Hong Kong office of an associated employer of the Respondent's family of companies, J.P. Morgan Securities (Asia Pacific) Limited ("**the Associated Employer**").

54. The Respondent has previously permitted a trader (named at the remedy hearing) to move from being a cash equities trader to being a derivatives trader, either as a Vice-President or Executive Director. Further, the Respondent has previously permitted a trader (named at the hearing) to move within cash equities from London to Hong Kong. Although one of these traders eventually returned to his original role, there is no evidence that the move had been unsuccessful.

55. The Hong Kong Role is different to the role from which the Claimant was unfairly dismissed. The Hong Kong Role is within the same asset class, although it involves trading equities derivatives, rather than cash equities.

56. Derivatives come in 2 general types: simple "vanilla" derivatives and complex "exotic" derivatives. The ways that exotic derivatives can be structured are almost unlimited. They are highly customisable. The Hong Kong Role involves trading both vanilla and exotic derivatives, and is directed more at exotic derivatives than vanilla derivatives.

57. The Claimant previously traded some vanilla derivatives. However, he would assess the need to make derivative trades on a daily basis. He received training on derivatives trading from the Respondent, and understands the mathematics behind them from his university studies.

58. The Claimant could get up to speed with the relevant Asian markets by the time he was re-employed by the Respondent if the lead time for any re-employment was 3 months.

59. If the Claimant was re-employed in the Hong Kong Role then he would have a slow start. However, he would be fully up-to-speed with the practicalities of his new role within 2 or 3 months. Nonetheless, his career development would be delayed by about 2 years.

60. Mr Sippel's account was that the Claimant could not succeed in the Hong Kong Role. However, Mr Sippel is not directly connected to the Hong Kong Role, although he has spoken to the hiring manager. As such, his actual knowledge of the requirements to be successful in that role is limited. Against the background of his assessment of the Claimant though, his views are in any event poisoned against the Claimant. That includes in respect of complying with a reengagement order and the requirements of the job, and the way he views the Claimant.

Relevant law

61. The three remedies for unfair dismissal are reinstatement, re-engagement (collectively, "**reemployment**"), and compensation. Only if reemployment is not

awarded will the Tribunal consider an award of compensation.

The most relevant parts of the Employment Rights Act 1996

62. Insofar as is relevant the Employment Rights Act 1996 provides as follows in particular:

"**112.— The remedies: orders and compensation.**

(1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.

(2) The tribunal shall—

(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and

(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.

(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126) to be paid by the employer to the employee.

113. The orders.

An order under this section may be—

(a) an order for reinstatement (in accordance with section 114), or

(b) an order for re-engagement (in accordance with section 115), as the tribunal may decide.

114.— Order for reinstatement.

(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

115.— Order for re-engagement.

(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—

(a) the identity of the employer,

(b) the nature of the employment,

(c) the remuneration for the employment,

(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,

(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(f) the date by which the order must be complied with.

(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the

period between the date of termination of employment and the date of re-engagement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

116.— Choice of order and its terms.

(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account—

(a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) […] it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement. […]

(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement."

The extent to which a decision at this stage is "provisional"

63. According to Lord Hodge, giving the judgment of the Supreme Court in the case of *McBride v Scottish Police Authority* [2016] UKSC 27; [2016] IRLR 633 (15 June 2016) at ¶ 37, the Tribunal's judgment on the practicability of the employer's compliance with an order is a prospective assessment and not a conclusive determination. It is therefore sufficient if the Tribunal reasonably thinks that it is likely to be practicable for the employer to comply with reinstatement. In relation to the question of practicability, at this stage, the Tribunal is required to make a forward-looking "provisional determination" as to practicality. *McBride* was a case relating to reinstatement but which in this regard is equally applicable to re-engagement.

64. The Court of Appeal in *Kelly v PGA European Tour* [2021] EWCA Civ 559; [2021] ICR 1124 (19 April 2021) considered the case of *McBride*. Lord Justice Lewis, with whom the rest of the Court agreed, noted as follows in particular regarding the question of the determination of the practicability of reengagement being "provisional":

> "56. Furthermore, the fact that the case law refers to the assessment of practicability at the stage of making the order as being provisional ought not to be mis-interpreted. The role of the employment tribunal is to determine whether to exercise its discretion to order re-engagement under section 116(2) of the Act. In doing so, it must take account of whether it is practicable for the employer to comply with an order for re-engagement. That assessment will not necessarily be a final, conclusive determination of practicability as an employment tribunal considering the award of compensation under section 117(3)(a) of the Act, if the order was not complied with, may also consider whether it was practicable to order re-engagement. In that sense, the initial assessment of practicability at the time of making an order for re-engagement may be described as "provisional" as the assessment may be subsequently revisited."

65. That is the context in which I consider the decision today on a "provisional" basis.

The meaning and assessment of "practicability"

66. According to Lord Justice Stephenson in the Court of Appeal in the case of *Coleman and anor v Magnet Joinery Ltd* [1974] IRLR 345 (8 October 1974), practicability means more than merely re-employment being possible: it means being "*capable of being carried into effect with success*". According to Mr Justice Choudhury in the EAT in the case of *Davies v DL Insurance Services Ltd* [2020] IRLR 490 (28 January 2020) at ¶24(b), whether it is so capable includes taking account of the size and resources of the particular employer.

67. Further, according to the EAT in *Davies* at ¶ 24(c), the "*employer's desires or commercial preferences are of little relevance*" albeit their commercial *judgment* remains important to the question of what is practicable.

68. In the case of *Rembiszewski v Atkins Ltd* EAT 0402/11/ZT (10 October 2012) the EAT held at ¶ 39 that as a matter of principle practicability must be assessed as

at the date the order will (or may) take effect.

Overstaffing, redundancy, and practicability

69. In the case of *Cold Drawn Tubes Ltd v Middleton* [1992] IRLR 160 (17 December 1991) the EAT commented as follows as regards the facts of that case: "*It is very difficult to see how reinstatement could become a practicable option, because it would result in either a redundancy process or in significant overmanning. It would be contrary to the spirit of the legislation to compel redundancies, and it would be contrary to common sense and justice to enforce overmanning.*" The Claimant has submitted that this is not necessarily good law, or at least not necessarily a full view of the law. However, even on the Claimant's case, the possibility of overstaffing and resulting redundancies as a result of an order for reinstatement remains a relevant factor in decisions on practicability of reinstatement.

The specificity required of an order for re-employment

70. The limits of the Tribunal's powers in this regard were discussed in the case of *Lincolnshire County Council v Lupton* [2016] IRLR 576 (19 February 2016) by Mrs Justice Simler at ¶ 22:

> "Although tribunals have a wide discretion as to the terms of an order for re-engagement those terms must be specified with a degree of detail and precision. […] To require simply that the employment must be comparable is not adequate to identify specifically and with precision into what role the council is ordered to re-engage the claimant."

Arrears of wages

71. According to the EAT in the case of *Electronic Data Processing Ltd v Wright* [1986] IRLR 8 (27 February 1985), any calculation of arrears of wages is to be based on the employee's earnings in the job from which they were dismissed, and not any job to which they might be re-employed.

72. According to the EAT in the case of *City and Hackney Health Authority v Crisp* [1990] IRLR 47 (27 October 1989), there is no jurisdiction to reduce an award for arrears of pay due to a failure to mitigate losses.

Conclusions

Reinstatement

73. The Claimant wants to be reinstated to his old role.

74. I accept that the team in which the Claimant worked has experienced redundancies since his dismissal. There is no scope for him being reinstated to a vacant position either at Vice President level or at Executive Director level. These positions are now full. Although people have been moved between positions, positions were filled by internal transfers, not the hiring of a replacement for the Claimant. Any reinstatement would lead to a further redundancy situation.

75. I accept that the possibility of further redundancies is not the be-all-and-end-all of reinstatement decisions. However, in the present case, it would inevitably be the case that reinstatement would result in serious overstaffing. It would consequently result in redundancies.

76. I therefore conclude on this basis that it would not be practicable for the Claimant to be reinstated.

77. Further, I accept that some senior members of the Respondent's staff, such as Mr Sippel, have taken irrational views about the 2016 Sell Orders and their effect on the practicability of re-employing the Claimant. Although the irrationality of the Respondent's staff's views count against them being given weight, the irrational views are nonetheless a matter that may impede the practicability of the reinstatement of the Claimant in his old team. This fortifies me in the conclusion that it would not be practicable for the Claimant to be reinstated.

Re-engagement

78. If the Claimant is not reinstated, he wishes to be reengaged by the Respondent or an associated employer.

79. The Claimant and the Respondent were engaged in protracted correspondence to identify an appropriate role in which the Claimant could be re-engaged with the Respondent or an associated employer. The Claimant originally identified 3 vacancies. By the time that closing submissions were made he only sought an order for re-engagement in respect of the Hong Kong Role or a general order for re-engagement.

80. I have concluded that, applying the case of ***Lupton***, a general order for re-engagement, whether by the Respondent specifically or a specific associated employer, would not be sufficiently precise to satisfy the terms of section 115(2) of the Employment Rights Act 1996. As such I have not given such a general order for re-engagement further consideration, and have considered the only identified role, the Hong Kong Role.

81. The Hong Kong Role is employment comparable to that from which the Claimant was dismissed. Even if it was not comparable, it would be other suitable employment. My reasons for this conclusion are as follows.

82. First of all, the Hong Kong Role is not directly connected to Mr Sippel.

83. Next, the Respondent has opted not to call any evidence from people who would be individually responsible for certifying the Claimant outside of the United Kingdom. I therefore proceed on the basis that, having had sight of the Liability Judgment and of all relevant evidence, whoever was required to do so would be able to certify the Claimant to the extent necessary under whichever national certification regime would apply.

84. I then ask myself what about the Claimant's suitability for the role? He has traded the asset class before, albeit as cash equities rather than as equities derivatives. He has traded derivatives before, although not frequently, and what he traded

were vanilla derivatives, rather than a combination of vanilla and exotic derivatives. He has the mathematical understanding for the job. And others in his position have performed such a move before with success. He can learn about the idiosyncrasies of the Hong Kong market in the time before his reengagement. He can pick up the practical side on the job.

85. Employing the Claimant in the Hong Kong role comes with risks for the employer. The Respondent called a significant amount of evidence on this. However, employing anyone in a trading role carries risks of substantial financial loss. What is important is the magnitude of the risks, and how they can be mitigated. The Respondent can appropriately manage the risks with training and supervision for the Claimant until he is fully up-to-speed in the role. The risks are not disproportionate, unreasonable, or otherwise such as to make employment in the role impracticable.

86. The employer for the Hong Kong Role is different to the Respondent. However, it is an associated employer. The Respondent is part of the same group of companies, with the same overarching corporate structure, as the Associated Employer. In this regard I note that the interrelations between the companies within the J P Morgan group are such that the Claimant at the outset of the claim had difficulty determining who his employer was, and so multiple corporate entities were entered on the ET1 claim form. The Respondent can easily procure the Claimant's employment by the Associated Employer in the Hong Kong Role. Any required certification of the Claimant as a person who is fit and proper to perform the role can be performed by a person other than Mr Sippel.

87. I therefore consider the overall practicability of re-engagement. I look at this question holistically. I consider how the Respondent and the Associated Employer can make this work. To put matters simply, in a global organisation of 250,000 people with immense financial resources, they can and will make it work.

88. His reengagement into this role would not be without any difficulties at all. But it would be practicable.

89. I then turn to consider whether to make the re-engagement order.

90. If re-engagement was not awarded, the Claimant would never work in a regulated role in the financial services sector again. This is partly because, at least within the United Kingdom, the Respondent's approach to providing a regulatory reference to the Claimant amounts to "blacklisting" him from any regulated employment in the sector. The Claimant would also have massive difficulties in obtaining employment inside and outside the United Kingdom given that he would not have a positive reference, and would be known as someone willing to take an unscrupulous employer to a Tribunal. As a result, re-engagement is the only way that the unfair dismissal in this case can be "made right".

91. In all the circumstances it is practicable and appropriate to order reengagement to the Hong Kong Role, and it would be practicable for the Associated Employer to comply with it. That is the Order I make.

Date for compliance

92. The Respondent's uncontested case is that it could not complete the "onboarding" of the Claimant immediately. Indeed, it says that it could not do so before 4 January 2022. This appears accurate.

93. The Claimant's current employment requires him to give 3 months' notice. It was appropriate for him to obtain further employment to mitigate his loss. A 3-month notice period is a reasonable one for a person in the Claimant's new position. The Respondent would in any event ordinarily need to wait for any newly hired staff to complete their notice period: it is not rare for an employer to need to do this.

94. The Claimant seeks a few further days after the 3 months to allow him to make a decision about what "offer" the Respondent makes for him about re-employment. However, the Respondent will not make an "offer", but rather comply with the detailed terms of the Tribunal's order. The Claimant therefore does not need this time. Nonetheless, he will require a day now to provide his resignation to his current employer, with notice.

95. As such, the Order for re-engagement must be complied with within 3 months and a day of the handing down of the Order, i.e. by 10 March 2021.

Dealing with the unvested IC

96. In making the order for re-engagement, the Tribunal must **so far as is reasonably practicable**, do so on terms that are as favourable as an order for reinstatement. An order for reinstatement "***is an order that the employer shall treat the complainant in all respects as if he had not been dismissed***." The effect of this is that the Tribunal is aiming with an order for re-engagement not to place the Claimant in a better or worse financial position than if he had not been dismissed, but as far as reasonably practicable in the same position. However, that position may necessarily be **different**, if it is not reasonably practicable to put the Claimant in the **same** position.

97. The Tribunal is not considering what would happen if the Respondent fails to comply with the Tribunal's Order for reengagement. The Tribunal has no power to do so and it is an irrelevant consideration. I have not considered this.

98. The Claimant claims that he should be awarded a cash sum in lieu of the unvested part of his IC. A large segment of the unvested part of his IC is not something that he would yet have access to, because it would not yet have vested. As such, the Respondent says that it should not be awarded as cash, but as unvested IC. However, the Claimant wants it now. The Claimant says that this can be done by ordering a reduction for accelerated receipt. In this way the Claimant says he is not placed in a better position than if he had not been dismissed.

99. The Respondent says that this is not possible. The Respondent says it puts the Claimant in a better position than if he had not been dismissed.

100. The Respondent's case is that the Claimant would not be able to "cash in" those unvested awards as at the date of compliance with the order for reengagement. However, the Respondent fails to consider how the Claimant could cash them in. The Claimant could have been bought out of the unvested part of the IC by a competitor to the Respondent, if the Claimant got a job with the competitor. This is not just a hypothetical example. The Claimant has been in the position of being prepared to accept a job with a competitor before. If he had continued in employment with the Respondent, it would have been ridiculous of him not to continue to assess his options with competitors in the same way. (Indeed, in passing, I note that the ability to cash in the unvested IC in this way has a purpose itself for the Respondent, in that it makes it more expensive for its competitors to poach its staff.)

101. Since he was dismissed, the Claimant has lost the opportunity to cash in the unvested part of his IC by being bought out of it by a competitor of the Respondent's.

102. Against this background, it is plain that the unvested IC has a real financial cash value to the Claimant, not just in the future, but for the entire time that its future vesting is awaited. The Claimant has lost out on that by losing out on the opportunity to cash it in.

103. If a reduction for accelerated receipt is made, then compared to if he had not been dismissed, the Claimant is placed in no better position just by having money now.

104. The Tribunal can best place the Claimant in the position he would have been in if he had not been dismissed by making an assessment of the value of the unvested IC, and making a 10% deduction to account for accelerated receipt.

Arrears of pay

105. The precise figures were to be agreed by the parties and entered into a Schedule to the Order, by basing their calculation on the following findings:

    (1) The Claimant's TC referable to the 2019 performance year would have been $548,500.

    (2) The Claimant's TC referable to 2020 performance year would have been 33.2% higher, i.e. $730,602.

    (3) The Claimant's TC referable to 2021 performance year would have been 20% higher, i.e. $876,722.40.

    (4) The Claimant would have been promoted to Executive Director in 2021.

    (5) Payment is to be made for the unvested IC with a 10% deduction for accelerated receipt.

    (6) By agreement, grossing up is to be done on the basis proposed by the Respondent.

106. Following discussion between the parties, it was agreed between them that the detailed figures for arrears of pay would be as follows:

(1) If the Claimant is Re-engaged on 9 December 2021, the Respondent shall make a payment to the Claimant of £1,145,247.31.

(2) If the Claimant is Re-engaged after 9 December 2021 but before 13 January 2022 (the RSU vesting date) [page 382], the Respondent shall pay the Claimant the amount set out in paragraph 2, plus for each calendar day which elapses during that period, an additional £653.63.

(3) If the Claimant is Re-engaged on 13 January 2022, the Respondent shall make a payment to the Claimant of £1,187,431.18.

(4) If the Claimant is Re-engaged after 13 January 2022 but before 18 January 2022 (the Incentive Compensation Award Date) [pages 264 to 268], the Respondent shall pay the Claimant the amount set out in paragraph 4, plus for each calendar day which elapses during that period, an additional £647.92.

(5) If the Claimant is Re-engaged on 18 January 2022, the Respondent shall make a payment to the Claimant of £1,553,745.34.

(6) If the Claimant is Re-engaged after 18 January 2022 but before 1 February 2022 (the salary-change date), the Respondent shall pay the Claimant the amount set out in paragraph 6, plus for each calendar day which elapses during that period, an additional £648.32.

(7) If the Claimant is Re-engaged on or after 1 February 2022 but before 10 March 2022, the Respondent shall pay the Claimant the sum of the amounts set out in paragraphs 6 and 7, plus for each calendar day which elapses during that period, an additional £706.09.

(8) If the Claimant is Re-engaged on 10 March 2022, the Respondent shall make a payment to the Claimant of £1,588,489.87.

Employment Judge Knight
Dated: 20 December 2021